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No. 79-1788

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

MARGARET Y. JUSTAK,

Petitioner,

vs.

A. A. BOCHNOWSKI, JOHN D. COCHRAN, KARL J. STIPHER, STEPHEN A. CLAFFEY, CHARLES E. SCHALLIOL, WILLIAM F. SATTERLEE, III, WALTER SCHRAGE, and FIRST BANK OF WHITING,

Respondents.

Brief Of A. A. Bochnowski, John D. Cochran, Karl J. Stipher, Stephen A. Claffey, Charles E. Schalliol, William F. Satterlee, III, Walter Schrage, and First Bank of Whiting, In Opposition To The Petition For Writ Of Certiorari

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A. A. Bochnowski, John D. Cochran, Karl J. Stipher, Stephen A. Claffey, Charles E. Schalliol, William F. Satterlee, III, Walter Schrage, and First Bank of Whiting, Respondents, pray that a Writ of Certiorari to review the judgments of the Appellate Court of Indiana in the above case be denied.

OPINIONS BELOW

Petitioner has failed to comply with Rule 40-1(a) which requires reference to the official and unofficial reports of the opinions delivered in the Courts below.

The Court of Appeals of Indiana's (Third District) opinion is *Margaret Justak v. A. A. Bochnowski* and these respondents, Appeal No. P.S. 404, filed July 29, 1979, reported in 391 N.E.2d 872, *rehearing denied*. The Supreme Court of Indiana dismissed Petitioner's (Justak's) "Petition to Transfer" for failure to comply with the time requirements of Rule A.P. 11(B) of the Rules of the Supreme Court of Indiana. No opinion of the Supreme Court was published.

JURISDICTIONAL GROUNDS

Petitioner relies upon Supreme Court Rule 21 and "related federal statutory and constitutional provisions of 42 U.S.C. 1983, 1985 and 1986, including the Due Process Clause of Amendments V and XIV of the United States Constitution. There is no concise statement of the subject matter intended to be addressed by Petitioner nor is there any specific ground for jurisdiction related in the brief.

Petitioner further makes no showing of jurisdiction as required by Rule 19 of the Supreme Court of the United States.

Rule 19, Federal Rules—Supreme Court, provides *inter alia*, that a review on a writ of certiorari is not a matter of right, and will be granted only where there are "special and important reasons" therefor. Petitioner has failed to state in her petition any of the "character of reasons" for such review which are specified in Rule 19. Respondents assert that sufficient jurisdictional grounds, as provided by the rules, have not been stated by Petitioner. The writ should, accordingly, be denied on these grounds alone.

CONSTITUTIONAL PROVISIONS AND TRIAL RULES INVOLVED

Petitioner makes no attempt to comply with Supreme Court Rule 40-1(c) which requires designation of the constitutional provisions, etc., and citations, which the case is alleged to involve. Again, such failure warrants denial of the writ.

QUESTIONS FOR REVIEW

The questions for review simply stated are as follows: (1) Whether the Supreme Court of Indiana's dismissal of Petitioner's "Petition to Transfer" for failure to comply with "Indiana Rules of Trial Procedure" entitles Petitioner to a review by this Court; (2) Whether the Court of Appeals of Indiana's decision affirming a trial court's dismissal of Petitioner's cause of action for failure to comply with the discovery rules under Indiana Trial Rules entitles Petitioner to a review by this Court; (3) Whether the jurisdiction of the highest Court in the State of Indiana was invoked by Petitioner in compliance with § 1257 of the Judiciary Act, which invocation is required as a prerequisite to filing a Petition For Certiorari; (4) Whether Petitioner's failure to make discovery in accordance with the Indiana Rules of Procedure and the trial court's subsequent dismissal of her action was violative of the Fifth (5th) and Fourteenth (14th) Amendment of the United States Constitution.

STATEMENT OF CASE

Petitioner (Justak) in her complaint sought to recover damages which were allegedly occasioned by the acts of appellees (Respondents) in connection with the estate of her deceased husband.

Notices were duly filed in the Jasper Circuit Court on January 9, 1976, and served upon Petitioner to take her deposition on January 29, 1976. Petitioner failed to appear without notice to anyone. On March 20, 1976 the court set petitioner's Motion for Postponement of Deposition of Margaret Justak and petitioner's Motion for Protective Order Under T.R. 26(c)(3) limiting Method of Discovery Allowed to Defendants (Respondents), for hearing on April 26th, 1976. Again, all respondents appeared but petitioner failed to appear for hearing.

On April 26, 1976, the trial court ordered petitioner to appear for deposition. The Order further provided: "If she (petitioner) should fail to appear as ordered herein on said date at said time and place, the court shall dismiss this action."

On the 3rd day of June, 1976, the petitioner physically appeared for the deposition, but stated that she had taken drugs and was in no condition, because of the medication, to proceed with the deposition. She further stated under oath that she was not responsible for what she would say at the deposition. Accordingly, the deposition was not taken.

On the 21st day of June, 1976, the Court, with petitioner appearing in person, entered the following order:

"The Court having been advised in open court, with all parties present, that the taking of the plaintiff's deposition scheduled on the 3rd day of June, 1976, at the hour of 10:00 O'clock A.M. before Gerry R. Yates, Official Court Reporter, United States District Court, Northern District of Indiana, was continued in view of the statement of the plaintiff that she was not physically or mentally able to proceed with the taking of the deposition, heretofore ordered to be taken, pursuant to and in accordance with the rules of Indiana Procedure.

Counsel for the defense, now in open Court, makes oral request that the Court fix a new date, time and place for the plaintiff Margaret Y. Justak to appear and present testimony consistent with the rules of procedure permitting discovery.

The request made by counsel for the defendants is granted and the Court now finds that Margaret Y. Justak should present herself for the taking of her deposition, and that she appear at a time, on a date, in a place certain, physically and mentally able to present testimony, as provided by and in accordance with the rules of discovery; or in the event she is not physically and mentally able to testify, that she present to this Court a sworn affidavit from a regular medical practitioner stating that said plaintiff is unable to proceed with the deposition; or upon failure to so do, and in the event plaintiff is unable to proceed with the deposition, the Court shall suspend all action and dismiss this action until said plaintiff is able to pursue and comply with said rules.

Accordingly, the Court now orders Margaret Y. Justak to make herself available to resume the taking of her deposition and that the said Margaret Y. Justak appear physically and mentally able, for the taking of her deposition before Gerry R. Yates, Official Court Reporter, United States District Court, Northern District of Indiana, Hammond Division, 507 State Street, Hammond, Indiana,

46320, or one of her assistants, on the 19th day of July, 1976, at the hour of 10:00 O'Clock A.M. Central Daylight Time, and if she should fail to appear as ordered herein on said date at said time and place, the Court shall dismiss this action. Further, it is ordered that in the event said plaintiff Margaret Y. Justak is not physically and mentally able to testify that she present timely to this Court a sworn affidavit made by and from a regular medical practitioner stating that said plaintiff is unable to proceed with the taking of said deposition or upon failure to so do and the plaintiff is unable to proceed with the taking of said deposition, the Court shall suspend all action and dismiss this action until the said Margaret Y. Justak plaintiff is able to pursue and comply with the rules of Indiana Procedure relating to discovery by the defendants.

The Clerk of the Pulaski Circuit Court is directed to mail a copy of this order to Margaret Y. Justak, 447-139th Street, Hammond, Indiana 46320 registered mail with return receipt requested.

Copies of this memorandum are mailed to counsel.

Dated and done this 21st day of June, 1976.

/s/ Harold R. Staffeldt, Judge
Pulaski Circuit Court"

(TR. p. 144-146)

Petitioner failed to comply with the aforementioned Court's Order.

Judgment was subsequently entered dismissing plaintiff's action (Appendix 1). Petitioner's Motion to Correct Errors was overruled and petitioner appealed to the Court of Appeals.

The Court of Appeals unanimously affirmed the trial court's decision and judgment (Appendix 8). Petitioner filed Petition for Rehearing before the Court of Appeals,

which was denied on April 29, 1979. Petitioner subsequently filed a Petition to Transfer to the Supreme Court of Indiana (Indiana's highest Court). Petition to Transfer was dismissed for failure to comply with a time requirement of Indiana Rule A.P. 11(B). Petitioner has failed to include a copy of the Petition to Transfer in her appendix.

ARGUMENT

I

PETITIONER HAS FAILED TO SHOW ANY SPECIAL OR IMPORTANT REASONS FOR REVIEW OF THIS MATTER UNDER RULE 19, SUPREME COURT RULES.

Rule 19 of this Court provides in part that review on writ of certiorari will be granted only where there are "special and important reasons therefor." The "character of reasons" for granting the writ are herein outlined, none of which are here invoked, nor does petitioner state the character of reasons which should be considered by the Court in this case.

As there special and important reasons for granting the writ here? This case simply involved the enforcement of the Indiana Trial Rules and affirmance of the trial court's action by the Court of last resort in Indiana. There is no statute involved; moreover, petitioner does not contest the constitutionality of the discovery rules involved, or the Court's right to enforce them. Her only contention is that the Court should not enforce the rules against her.

Even assuming, *arguendo*, that the decision of the Indiana state court is erroneous, this is not a matter of

"substance" in the constitutional sense. This Court does not sit for the benefit of particular litigants. *Magnum Import Co. v. Coty*, (1922) 262 U.S. 159, 69 L.Ed. 922, 32 S.Ct. 531. As Mr. Justice Frankfurter pointed out:

> "Special and important reasons imply a reach to a problem beyond the academic or episodic. This is especially true where the issues involved reach constitutional dimensions . . ." *Rice v. Sioux City Memorial Park Cemetery*, (1955) 349 U.S. 70, 74, 99 L.Ed. 897, 75 S.Ct. 614.

Writs of certiorari should be used sparingly to bring up cases of public importance. This does not have the "surface appearance of public importance." *Rice v. Sioux City Memorial Park Cemetery, supra.*

II.

WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE NO SUBSTANTIAL FEDERAL QUESTION WAS PRESENTED OR DECIDED.

Petitioner's sole issue presented is posited as follows: The trial court should not have enforced the Indiana Trial Rules by dismissing her case for wilfully refusing to make discovery, notwithstanding the fact that petitioner had been preadvised by the trial court that such action would be taken in the event she failed to comply with the court's order compelling discovery.

To afford the basis for review, either by appeal or certiorari, the federal question upon which the state court judgment hinges must be substantial. *Zucht v. King*, (1922) 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194; *Tidal Oil Co. v. Flanagan*, (1924) 263 U.S. 444, 44 S.Ct. 197, 68 L.Ed. 382. The Court in *Zucht, supra* stated:

> "But although the validity of a law was formally drawn in question, it is our duty to decline jurisdiction whenever it appears that the constitutional

> question presented is not, and was not at the time of granting the writ, substantial in character. *Sugarman v. United States*, 249 U.S. 182, 184." *Zucht, supra*, at 176.

One of the attributes of a substantial federal question is the novelty of the question being presented to the Court. In the case of *Patterson v. Stanolind Oil & Gas Co.*, 305 U.S. 376, 83 L.Ed. 231, 59 S.Ct. 259, this Court was confronted with a decision on appeal, which decision was consonant with well settled principles of law. The Court in *Patterson* stated:

> "In that view, the state court applied well settled principles in denying plaintiff's contentions under the 14th Amendment. . . . The argument that regulatory provisions of the statute authorizing the commission to make its order fixing the drilling unit are void for indefiniteness, is without merit.
>
> In light of our previous decisions, the plaintiff has failed to raise a substantial federal question, and the appeal is dismissed for want of jurisdiction."

Thus, if a question has been previously adjudicated by this Court upon well settled principles, no substantial federal question is presented.

This Court has previously refuted the proposition that dismissal of an action for failure to comply with trial rules by a trial court, is not violative of the 5th and 14th Amendments to the Constitution. Accordingly, no substantial federal question exists and this petition for certiorari should be denied. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 8 L.Ed.2d 734, 82 S.Ct. 1386; *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 330, 29 S.Ct. 270, 53 L.Ed. 530.

III.

JURISDICTION OF THE HIGHEST COURT IN THE STATE HAVING EITHER OBLIGATORY OR DISCRETIONARY POWER OF REVIEW MUST BE INVOKED BEFORE THE SUPREME COURT OF THE UNITED STATES WILL REVIEW ON CERTIORARI.

Petitioner in the case at bar failed to invoke the power of review of the Indiana Supreme Court (the highest court in Indiana) in accordance with its rules. She failed to comply to the rules which resulted in the Supreme Court of Indiana entering an order of dismissal of her Petition to Transfer.

Moore's Federal Practice, 2nd Ed., 7B (Judicial Code) § 1257 succinctly summarizes the applicable principle which is here adopted by respondent.

> "Jurisdiction of the highest court in the state having either obligatory or discretionary power of review must be invoked. *Gotthilf v. Sills* (1963) 375 US 79, 84 S Ct 187, 11 L ed2d 159 (This prerequisite is not satisfied where the highest court of the state refuses to review because the proper state appellate procedure was not observed. New York Court of Appeals dismissed, for want of jurisdiction, both a motion for leave to appeal and an appeal as of right from the Appellate Division. Proper New York procedure was to apply to the Appellate Division for leave to appeal upon certified questions. Since this was not done, the judgment of the Appellate Division was not that of the highest court of New York within the meaning of § 1257.); *Great Western Telegraph Co. v. Burnham* (1896) 162 US 339, 16 S Ct 850, 40 L ed 991; *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Rock* (1929) 279 US 410, 49 S Ct 363, 73 L ed 766."

The highest court of the State of Indiana refused to review because proper State Appellate procedure was not observed. Petitioner has failed to comply with the essential prerequisite and is not entitled to review in this Court.

IV.

TRIAL COURT'S ENFORCEMENT OF INDIANA TRIAL RULES COMPELLING DISCOVERY IN A CIVIL ACTION DOES NOT VIOLATE THE FIFTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION.

Petitioner's Appendix 8 through 18 disclosed the detailed facts surrounding her failure to make discovery under the Indiana Trial Rules. The material trial court's finding of facts, which were affirmed by the Appellate Court of Indiana, are as follows:

> "8. The plaintiff appeared and was sworn in for the taking of her deposition of July 19, 1976, as scheduled. . . . [T]he Defendants were prevented from completing this deposition as the result of the plaintiff again claiming sudden and debilitating illness. Credible and proper medical evidence to support this claim has not been presented to the Court.
>
> 9. Plaintiff failed, as required by the Order of this Court to timely file with this Court a sworn affidavit made by and from a regular, licensed medical practitioner stating the plaintiff is unable to proceed with or to give her deposition.
>
> 10. The plaintiff has energetically participated in several lengthy hearings before this Court, all without physical difficulty or illness.
>
> 11. The plaintiff has repeatedly and willfully refused to comply with the orders of this Court respecting discovery. The evasive and obstructive tactics of the plaintiff have been in bad faith and are without meritorious excuse or justification. The Defendants have been thwarted without good cause and to their detriment from obtaining discovery for over one year.
>
> 12. The claims of the plaintiff have not been supported by proper and credible evidence and her

behavior has been inexcusable. The Defendants have suffered irreparable harm and will continue to be damaged were this action to be permitted to continue.

13. Every reasonable effort has been made by the Court and the Defendants to compel the plaintiff to submit to proper and meaningful discovery, all without success.

14. A grant of relief to the Defendants short of dismissal of the action with prejudice will not be adequate or effective. Additional leniency or patience is not appropriate. The plaintiff has abused the Court and its orders. The plaintiff has filed numerous dilatory, obstructive and sham pleadings and motions in an effort to continue her avoidance of discovery. The claims of the plaintiff have approached a scandal and contempt on this Court and the Defendants.

15. It is the duty of this Court, under Trial Rule 37(B), to prevent abuse of discovery proceedings and to secure enforcement of the discovery provisions of the Trial Rules. Dismissal of plaintiff's action with prejudice is an appropriate remedy under the factual circumstances presented to this Court and necessary to properly protect the integrity of the discovery rules of this Court and State and the rights of the Defendants. This Court specifically finds and determines that the conduct of the plaintiff had and will continue to so delay and obstruct the rights of the Defendants, that relief other than Dismissal with prejudice would be inadequate."

"The trial court then entered an order dismissing Justak's complaint with prejudice." (Petitioner's Appendix 11 and 12)

Trial Rule 37 of the Indiana Rules of Court, Section A(4) provides as follows:

(4) The Court may enter total or partial judgment by default or dismissal with prejudice against

> a party who is responsible under subdivision (B)(2) of this rule if the court determines that the party's conduct has or threatens to so delay or obstruct the rights of the opposing party that any other relief would be inadequate.

Petitioner does not contest the constitutionality of Rule 37 but simply contends that the rule should not have been enforced against her. The trial court and the Court of Appeals of Indiana held otherwise. This Court has unequivocably held that the State courts have a right to enforce their trial rules and such enforcement is not repugnant to the Constitution.

The Court in *Hammond Packing Co. v. Arkansas, supra,* which clearly supports denial of the petition in this case stated:

> "as the power to strike an answer out and enter default . . . which is before us, is clearly referable to the undoubted right of lawmaking authority to create a presumption in respect to the want of foundation of an asserted defense against a defendant who suppresses or fails to produce evidence when legally called upon to give or produce, our opinion is that the contention that the section was repugnant to the Constitution of the United States is without foundation." *Hammond Packing Co., supra,* at 353, 354.

The trial court in this action rightfully exercised its discretion in dismissing plaintiff's action in accordance with Trial Rule 37. The soundness of this judicial decision was affirmed by the Appellate Court of Indiana.

CONCLUSION

Respondents respectfully submit that this case is not a proper one for review by certiorari by this Court, and that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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